



DATE ISSUED: May 31, 1989
CASE NO: 88-INA-340

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

HIPOINT DEVELOPMENT, INC.
Employer

on behalf of

KEYVAN I. EBTEHAZ
Alien

Richard I. Kinjo, Esq.
Leslie J. Frank, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner, Guill, Tureck, and
Williams, Administrative Law Judges

NAHUM LITT
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the

¹ All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A349), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On July 18, 1986, the Employer filed an application for alien employment certification to enable the Alien to fill the position of project engineer. The duties were to supervise, direct, and coordinate functional authority for planning and organization control; initiate integration and completion of engineering projects within the area of assigned responsibilities. A BS degree in civil or architectural engineering and four years of experience in the job offered were required. (A90-311).

On September 18, 1987, the CO issued a Notice of Findings, questioning whether there was a bona fide job open to U.S. workers as required by §656.20(c)(8). (A86-88). The CO also stated that the Employer must specify the lawful job-related reasons for not hiring each U.S. worker who applied as required by §656.21(j)(1). The CO questioned the definition of the term "project engineer" as used by the Employer, and concluded that 14 applicants appeared to have qualifying experience. He found that the Employer had not demonstrated that those 14 applicants, through a combination of education, training, or experience, cannot perform the basic job duties in a satisfactory manner. The CO required the Employer to document that the applicants were not qualified, willing, or available at the time of initial consideration and referral. The CO also required the Employer to provide further information with regard to the contacts and interviews of applicants in cases where the recruitment results were incomplete. (A88).

In its rebuttal of October 22, 1987, the Employer submitted records with respect to its incorporation, by-laws, minutes, tax records, and project records to establish that there is a bona fide job opening. With respect to the 14 applicants the CO found qualified, the Employer specified its reasons for rejecting each applicant based on an inadequacy in education, training, or experience. Ten of the applicants were considered unqualified as lacking sufficient site or field supervisory experience. Four of the applicants who appeared to be qualified had been contacted by the Employer by telephone during the recruitment period to see if they would come to its facilities for a personal interview. One of the applicants was not interested in coming for a personal interview. The remaining three applicants were interested in coming for an interview, if

employer paid their expenses.² The Employer refused to pay expenses, and therefore, considered the applicants unqualified for the job. (A5-85, A312-315).

The CO issued a Final Determination denying certification on March 16, 1987, on the ground that the Employer failed to specify lawful, job-related reasons for not hiring U.S. workers under §656.21(j)(1). (A2-A4). With regard to the U.S. applicants who were invited for personal interviews, the CO found no evidence that "applicants G.S. Widman, William George, or Raymond Hashim refused to travel to California for interview after discussion with the employer, nor is there evidence of the employer's policy on payment or non-payment of travel expenses for job candidates." (A4). The CO concluded that the Employer has not sufficiently documented that the U.S. applicants were not able, willing, qualified, or available at the time of initial consideration and referral. (A4).

On November 20, 1987, the Employer requested review. (A1). In its brief on appeal, the Employer argued that U.S. applicants Widman, George, and Hashim, after extensive telephone interviews, were invited to come to the Los Angeles area of California for a personal interview, but refused because Employer would not pay their expenses. The Employer argues that the Board has never addressed the question of whether the employer must pay travel expenses of the most qualified applicants where a personal interview is a prerequisite and the job is a professional one meriting a large geographic area of recruitment, citing *In re L.A. United Investment Co.*, 87 INA 738 (Apr. 20, 1988). The Employer concluded that the Department of Labor should not impose on the employer the burden of shouldering such expenses.

Discussion and Conclusion

The CO denied certification on the ground that the Employer failed to document lawful, job-related reasons for rejecting each U.S. worker. According to the Employer, three U.S. workers were considered unqualified based on their unwillingness to appear at the Employer's place of business for a personal interview at their own expense. The Employer argues that the Department should not impose upon employers the costs of travel expenses of the most qualified applicants where a personal interview is a prerequisite and the job is a professional one meriting a large geographical area of recruitment.

Under §656.21(b)(7), the Employer bears the burden of documenting lawful, job-related reasons for rejecting each U.S. worker who applies for the position. The Board had held that when an employer imposes the requirement of a personal interview on job applicants, it is up to the employer to take steps to minimize the burden of this requirement. *In re L.A. United Investment Co.*, 87 INA 738 (Apr. 20, 1988). The Board has also denied certification where the employer's failure to arrange interviews for even the most qualified applicants suggests that the employer was using the interview requirement as a means to reject U.S. workers. *In re Lin & Associates, Inc.*, 88 INA 7 (Apr. 14, 1989). "[I]nsisting that it has a right to require personal interviews but has no duty to pay for applicants to come to Seattle to be interviewed, Employer

² These applicants are G.S. Vidman of Sacramento, CA; William B. George of Greeley, CO; and Raymond Haskim of Richardson, TX.

failed to carry out or propose any procedure to mitigate the hardship on job applicants. We find that the rejection by employer of so many seemingly qualified U.S. workers for failing to appear for personal interviews at their own expense, without attempting to limit the burden on this pool of applicants, is inconsistent with §656.21(b)(7)." Id.

In the instant case, the Employer has not documented lawful, job-related reasons for rejecting three U.S. workers. The Employer concluded, after initial telephone interviews, that applicants, Vidman, George, and Haskim, appeared to be qualified. (Brief page 3). The Employer's failure to interview the three apparently qualified applicants does not provide evidence that they are less qualified. Instead, the Employer, by not interviewing, is denied the opportunity to further investigate the applicant's qualifications. Since the only evidence in the Employer's possession is that these applicants probably are qualified, it follows that is in the Employer's interest to bring these applicants in for interviews. That an applicant refuses to pay his or her own expenses for the purpose of being interviewed cannot be the bases for rejecting an apparently qualified applicant.

Accordingly, where more than local recruitment efforts are required, yielding referrals of apparently qualified U.S. applicants, the employer must make efforts, either through telephone interviews or through personal interviews at the employer's expense, to determine the qualifications of the U.S. applicants, and to specify lawful, job-related reasons for rejecting each U.S. applicant.

ORDER

The Final Determination of the Certifying Officer denying certification is hereby
AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

NL:WB